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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEE S. LEICHTLING, D.D.S.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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The petitioner, Lee S. Leichtling, D.D.S., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 19, 1982.

QUESTION PRESENTED

Whether the affidavit in support of the search warrant for petitioner's residence submitted to the United States Magistrate contained sufficient facts to establish probable cause to believe that the petitioner was concealing cocaine therein.

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OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto. The Federal Reporter citation, however, is 684 F.2d 553. No opinion was rendered by the District Court for the Eastern District of Missouri.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eighth Circuit was entered on July 19, 1982. A timely petition for rehearing with suggestions for rehearing en banc was denied on August 10, 1982, and this petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41, Federal Rules Of Criminal Procedure

(c)(1) Warrant Upon Affidavit

A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally or may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law therefore or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Title 21, United States Code, Section 843(a)(3):

Set out in Appendix.

Title 21, United States Code, Section 841(a)(1):

Set out in Appendix.

STATEMENT OF THE CASE

On October 27, 1981, the petitioner, Lee S. Leichtling, D.D.S., was found guilty, pursuant to a jury verdict, on six (6) counts of obtaining a controlled substance by fraud, in violation of Title 21, United States Code, Section 843(a)(3), and one (1) count of possession of a controlled substance with the intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1). The case was tried in the United States District Court for the Eastern District of Missouri, the Honorable James H. Meredith presiding. The petitioner was sentenced to imprisonment for a period of ten (10) years on Count VII; sentenced to imprisonment for a period of three (3) years on each of Counts I, II and III to run consecutively, but to run concurrently with the sentence imposed under Count VII; sentenced to imprisonment for a period of three (3) years on each of Counts IV, V and VI to run consecutively, but to run concurrently with the sentence imposed under Count VII. In addition, a three (3) year special parole term was imposed.

The United States Court of Appeals for the Eighth Circuit affirmed petitioner's conviction in a judgment and opinion issued July 19, 1982, and denied petitioner's timely petition for rehearing with suggestions for rehearing en banc on August 10, 1982.

On July 16, 1981, a Special Agent of the Drug Enforcement Administration (affiant) appeared before a United States Magistrate for the Eastern District of Missouri seeking a search warrant for petitioner's residence. The information presented to the Magistrate consisted solely of the affiant's sworn affidavit, a copy of which is included in the Appendix.

The affidavit stated that the affiant received information that two one-ounce bottles of pharmaceutical cocaine would be delivered to a pharmacy on May 27, 1981. On that date the affiant observed the petitioner exit the pharmacy carrying "what appeared to be two similar bottles in a plastic case," and, "enter a blue Mercedes automobile and **drive in the direction of the residence** which is the subject of this search warrant." (emphasis supplied).

The affiant further stated that he received information that another shipment of two one-ounce bottles of pharmaceutical cocaine was to be delivered to the same pharmacy on July 10, 1981. On that date, the petitioner was seen to receive two one-ounce bottles from the pharmacist and exit the pharmacy. Surveillance agents further "observed the subject Lee Leichtling to place a pharmacy bag inside a brown vinyl case which appeared to be identical to the case he used on May 22, 1981; thereafter, the subject Lee Leichtling entered a blue Mercedes automobile which is registered to him, and proceeded to **drive to the above-described residence.**" (emphasis supplied).

Based upon the information contained within the affidavit, the Magistrate determined that probable cause existed for the issuance of a search warrant, and on July 17, 1981 law enforcement officers executed a search of petitioner's residence. The search uncovered, among other items, bottles containing cocaine hydrochloride. All of the items seized in the search of petitioner's residence were admitted into evidence over counsel's timely objections.

ARGUMENT

The Fourth Amendment to the United States Constitution states that "no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Petitioner submits that he has standing to challenge the search and seizure in the instant case because his own Fourth Amendment rights were violated by an illegal intrusion into his residence in which he had a legitimate expectation of privacy. *United States* v. *Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

When seeking to obtain a search warrant for an individual's residence, government officials must adhere to strict constitutional guidelines and rules of procedure. Rule 41(c) of the Federal Rules of Criminal Procedure requires that a neutral and detached magistrate may issue a search warrant only upon a finding of probable cause. The finding of probable cause must be based upon information contained solely in the sworn affidavit and/or sworn recorded testimony presented to him. *Zurcher* v. *Stanford Daily News*, 436 U.S. 547, 558, 98 S.Ct. 1970, 1977, 56 L.Ed.2d 525 (1978). This "four corners" approach has been adopted by this Court and is widely recognized among the Circuits. *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1, 84 S.Ct. 1509, 1511 n.1, 12 L.Ed.2d 723 (1963); *United States* v. *Melvin*, 596 F.2d 492 (1st Cir.), cert. denied, 444 U.S. 837, 100 S.Ct. 73, 63 L.Ed.2d 48 (1979); *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971); *United States* v. *Pinkerman*, 374 F.2d 988 (4th Cir. 1967); *United States* v. *Gillespie*, 368 F.2d 1 (8th Cir. 1966).

Probable cause exists if facts within the magistrate's knowledge and of which he had reasonably trustworthy information would warrant a man of reasonable caution in the belief that a crime was committed and that the evidence is at the place

to be searched. *Draper* v. *United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1964); *United States* v. *Maestas*, 546 F.2d 1177, 1180 (5th Cir. 1977).

The Circuit Courts have thus attempted to balance the decisions of this Court against the dictates of the Fourth Amendment to establish a standard for the issuance of a warrant to search a residence. The Circuits are divided over the specificity of information which is needed to lay the foundation for the magistrate's finding. The differentiation primarily rests with the required nexus between the objects to be seized and the premises to be searched.

The Fifth Circuit requires the affidavit to reveal *factual observations* that the objects were at the defendant's residence. *United States* v. *Flanagan*, 423 F.2d 745, 747 (5th Cir. 1970). The *Flanagan* affidavit recited that a home was burglarized, that the stolen property remained unrecovered, that the defendant was a known felon, and that the defendant was arrested earlier in the day with some of the stolen property on his person. In holding the affidavit insufficient to support a finding of probable cause to search defendant's residence, the Court noted:

> "The affidavit contained nothing, either in the limited recital of the DA's personal knowledge (that Flanagan was a known felon) or communications from informants (factual or conclusory) that the missing goods were where the DA said they might be, other than the house was said to be Flanagan's residence." *Id.*, at 747.

Similarly, a recent decision from a District Court in the Seventh Circuit requires the affiant's direct observations of the object of the search entering a residence before probable cause is met to sustain the issuance of a search warrant. *United States* v. *Rambis*, 526 F.Supp. 866 (N.D. Ill. 1981).

This Court has also indicated that a direct link between the "contraband" and the inside of the residence to be searched is required. In *Spinelli* v. *United States*, 393 U.S. 410, 423, 89 S.Ct. 584, 27 L.Ed.2d 637 (1969), Justice White, concurring with the opinion of the Court, which held an affidavit insufficient, writes, "[A]n investigator's affidavit that he has seen gambling equipment being moved into a house at a specified address will support the issuance of a search warrant." Thus, where the affidavit states the affiant's or informer's personal observations of the items to be seized inside the residence, the Courts have had little difficulty validating the warrant. See *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) (an informant recited that while in the suspect house he observed and purchased illegal whiskey); *United States* v. *Fleming*, 566 F.2d 623 (8th Cir. 1977) (informant saw one-half pound of marijuana at defendant's residence and the defendant offered to sell the informant marijuana).

Courts have also upheld affidavits based upon the observations of the affiant while situated outside the premises to be searched. In *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), this Court upheld an affidavit which stated that the affiant smelled the odor of fermentation eminating from the suspect house, heard metallic and pump noises from within, observed the defendant on four occasions unload sixty pound bags of sugar from his vehicle, and observed the vehicle being loaded with five gallon cans which were brought from the house. Clearly, the nexus between criminal activity and the residence to be searched was established.

Likewise, where the affidavit included information that the defendant received two orders of chemicals at a specified address which, when combined, could only produce methamphetamine, that the defendant made late night and Sunday entries into the structure, and that the defendant was observed to assemble lab equipment inside the address, a search warrant was properly issued. *United States* v. *Drake*, 673 F.2d 15 (1st Cir. 1982). See also, *United States* v. *Coppage*, 635 F.2d 683 (8th Cir. 1980).

Searches have been upheld where the affiant witnessed no activity inside, nor outside of the premises to be searched. *Anthony* v. *United States,* 667 F.2d 870 (10th Cir. 1981); *United States* v. *Brown,* 584 F.2d 252 (8th Cir. 1978); *United States* v. *Lucarz,* 430 F.2d 1051 (9th Cir. 1970). The Court in *Anthony, supra,* stated:

> "The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." *Id.,* at 874.

See also, *Grimaldi* v. *United States,* 606 F.2d 332 (1st Cir. 1980).

The case before the Court is a possessory offense of two one-ounce bottles. It is not the type of case where bulky apparatus is required for the manufacture of explosive devices, narcotics or illegal whiskey. In the latter cases, the very nature of the offense demands a fixed, sheltered situs from which to operate. The Courts have reasonably inferred, then, that the subject items of the search would be found at the location named in the affidavit.

No *Anthony, et al,* inference can be drawn from the facts in *Leichtling* to suggest that the two bottles were probably located inside petitioner's residence. Indeed, the most plausible hypothesis, given the facts within the affidavit, is that the bottles were located at petitioner's office, where cocaine-hydrochloride has an accepted dental use as a topical anesthetic. In addition, the opportunities for concealment of two one-ounce bottles are boundless. Petitioner submits that the *An-*

thony line of "reasonable inferences" cases is inopposite, and that direct factual observations are required in order to link the items sought and the place to be searched.

Even in the Courts which do not require direct observation of criminal activity, there still exists the fundamental requirement that the affidavit allege sufficient facts to warrant a reasonable person to believe that the objects sought would be found in the place described. Where an affidavit recited that the defendant purchased explosives, that he threatened a former employer and alluded to explosives in the threat, that a bomb was found at the former employer's plant and that no proper storage facilities existed at defendant's residence, the Eleventh Circuit found the affidavit insufficient to support a finding of probable cause. *United States* v. *Lockett*, 674 F.2d 843, 846 (11th Cir. 1982).

The *Lockett* Court made clear that the nexus necessary between the objects to be seized and the premises to be searched must be clear-cut. In *Lockett*, the affidavit was held insufficient because there was a link missing "in the chain of facts and circumstances which would lead to a reasonable belief that dynamite was improperly stored at Lockett's Sweetwater address." *Id.*, at 846. The affidavit set forth no facts from which the magistrate could infer that dynamite was located at that particular place. The Eleventh Circuit reasoned that:

> "[I]t is true that the nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation. *United States* v. *Charest*, 602 F.2d 1015 (1st Cir. 1979). It is equally true that a search will be upheld if 'the facts described in the affidavits warrant a reasonable person to believe that the objects sought would be found.' *United States* v. *Green*, 634 F.2d 222, 225 (5th Cir. 1981). Nevertheless, there still must be a '*substantial basis*' to conclude that the instrumentalities of the crime will be discovered on the searched premises." *Aguilar* v. *Texas*, 378 U.S. at 111, 84 S.Ct. at 1512; *United States* v. *Melvin*, *supra*. *Id.*, at 846. (emphasis supplied).

The Eighth Circuit, in *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), held that the magistrate must not use his imagination when making a probable cause determination. In *Taylor*, the affidavit was based upon, and the search warrant was issued solely on the conclusion that the instrumentalities were hidden inside the residence in question. The Court held that this unsupported conclusion was inadequate to allow the inference of probable cause:

> "Nowhere in the affidavit is it set forth that the surveilling officer saw Worley [a co-defendant] on any occasion enter the house at 1728 or exit the premises. Nowhere in the affidavit is it set forth that the surveilling officers observed the defendant on any occasion either entering or exiting said house... Therefore, at that point, it was a conclusion, based on a mere suspiciion of the surveilling agents, that the house in question contained the firearms. Consequently, the official who issued the warrant relied on the same conclusion." *Id.*, at 836.

The *Taylor* Court subsequently held the search warrant invalid because the magistrate "[could not] rely on facts...which raise a mere suspicion or conclusion which he equates to be a proper finding of probable cause." *Id.*, at 836. See also, *United States* v. *Schmidt*, 662 F.2d 498, 505 n.9 (8th Cir. 1981).

Recently, the Second Circuit found that the "substantial basis" test was satisfied. In *United States* v. *Jackstadt*, 617 F.2d 12 (2nd Cir. 1980), the affidavit revealed the following allegations: that large purchases of petroleum ether (used to extract hashish oil from marijuana) had been made by the defendants using false names; that there were links between one of the defendants and the manufacture of hashish oil; that the transporting automobile was parked at the residence after being followed from the chemical company; and that a defendant was observed removing a five-gallon can of petroleum ether from

the rear of the vehicle. Although the affidavit did not recite that the defendant carried the can into the residence, the Court upheld the search, reasoning:

> "[I]t would be surprising indeed if Jackstadt had purchased petroleum ether, driven it to his home, removed a five-gallon can from his car and then strolled with it down the street. The inference that Jackstadt carried the ether into the house was plainly a reasonable one in the circumstances of the case." *Id.*, at 14.

In comparing the affidavits in *Jackstadt* and the case before the Court, a crucial distinction is apparent. The petitioner concurs that the *Jackstadt* Court was reasonable in its inference that the defendant would not "stroll" with the five-gallon can, but would likely enter his residence. In *Leichtling*, however, the affidavit states that on one occasion the petitioner "drove in the direction of" his residence, and on another occasion "drove to his residence." On the first occasion, the affidavit does not even place the petitioner at or near the premises to be searched. On neither occasion does the affidavit allege that the petitioner entered or approached his residence, removed cocaine hydrochloride from the vehicle, nor even that the petitioner exited his vehicle. While the affidavit may allege sufficient facts to justify a search of the person or vehicle, *United States* v. *Solario*, 577 F.2d 554 (9th Cir. 1978), the *Leichtling* affidavit lacked the requisite "substantial basis" to conclude that the items would be found in petitioner's residence.

In addressing this issue, the Eighth Circuit Court of Appeals overcame these obstacles by holding:

> "[W]e think the recitation in the affidavit that Dr. Leichtling was observed to drive 'to' his residence raises a reasonable inference that he actually entered his residence, because we can think of few situations where a person would drive to his residence without entering it." *Leichtling* opinion, at 6.

Petitioner submits that the Eighth Circuit overlooked the essential requirement in determining the sufficiency of an affidavit, i.e., the nexus necessary between the item to be sought and the place to be searched. Assuming arguendo, that a magistrate may infer that a person driving "to" his residence will enter it, the Eighth Circuit must then make the second assumption, without any basis, that the Petitioner carried cocaine into his residence with him.

This Court must not condone the Eighth Circuit's "inference upon inference" approach in determining the sufficiency of an affidavit. Absent in the Eighth Circuit's opinion is the justification for the second inference. The Court only addresses the issue of inferring that the petitioner entered his residence. In so doing, the Eighth Circuit has taken a quantum leap from the "reasonable inferences" - "substantial basis" approaches permitted by the other Circuits, and has authorized magistrates to use speculation and conjecture to fill in the missing links in a defective affidavit.

Not to be forgotten is the Court's admonition that "[T]he proceeding by search warrant is a drastic one, and must be carefully circumscribed so as to prevent unauthorized invasions of the 'sanctity of a man's home and the privacies of life.' " *Berger* v. *New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), citing, *Boyd* v. *United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

Petitioner contends that the Eighth Circuit's opinion in *Leichtling* is in conflict with every Circuit, especially the Fifth and Eleventh, which has addressed the sufficiency of an affidavit to support the search of a residence. The issues presented herein are ripe for review by this Court, not only to prevent Rule 41(c) from becoming a "rubber-stamp" procedure, but also to provide guidance to all the courts of the country in this crucial Fourth Amendment question.

Respectfully submitted,

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APPENDIX

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2252

United States of America,

Appellee,

v.

Lee S. Leichtling,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: April 15, 1982

Filed: July 19, 1982

Before BRIGHT and HENLEY,* Circuit Judges, and BARTLETT, District Judge.**

HENLEY, Senior Circuit Judge.

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* The Honorable J. Smith Henley assumed senior status on June 1, 1982.

** The Honorable D. Brook Bartlett, United States District Judge, Western District of Missouri, sitting by designation.

Lee S. Leichtling has appealed his conviction in the district court[1] on six counts of obtaining a controlled substance by fraud, in violation of 21 U.S.C. § 843(a)(3), and one count of possession of a Schedule II controlled substance with intent to distribute, in violation of 21 U.S.C. § 843(a)(1). The gravamen of Leichtling's contentions on appeal is that twenty-nine of the government's exhibits (described in the Appendix hereto) were improperly admitted into evidence in violation of his fourth amendment rights. For reasons to be stated, we affirm.

In early July, 1981 federal Drug Enforcement Administration (DEA) agents applied to a federal magistrate for a warrant to search the residence of appellant, a thirty-seven year old dentist. The application was accompanied by an affidavit; however, none of the agents applying for the warrant testified before the magistrate. The affidavit stated that DEA agents had received information regarding a series of purchases of pharmaceutical cocaine by the Rock Road Pharmacy in DeSoto, Missouri, and that further investigation had revealed that a shipment of two bottles of cocaine-hydrochloride was to be delivered to that pharmacy on May 22, 1981. According to the affidavit, surveillance initiated by the officers revealed an individual, subsequently identified as Dr. Leichtling, leaving the pharmacy with two similar bottles, which had been placed in a brown plastic case. This individual entered a blue Mercedes convertible and drove "in the direction of the residence which is the subject of this search warrant." The affidavit also recited that appellant was observed on July 10, 1981 exiting the pharmacy with two one-ounce bottles, which had apparently been placed in the same plastic case,[2] and that he entered his automobile and "pro-

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[1] The Honorable James H. Meredith, United States Senior District Judge, Eastern District of Missouri.

[2] The officers' information indicated that the pharmacy had received an additional shipment of two one-ounce bottles of cocaine-hydrochloride on that day.

ceeded to drive to the above-described residence." The affidavit further recited that Leichtling had never been authorized or registered to possess, distribute or dispense Schedule II substances.

The warrant was issued, and at approximately 8:15 a.m. on July 17, 1981 law enforcement officers arrived at Dr. Leichtling's home. They were greeted at the door by the appellant. The officers introduced themselves and asked if they could discuss with him the cocaine purchases. The doctor admitted them to his house, and he was immediately thereafter advised of his *Miranda* rights.[3] Appellant was asked if he used cocaine in his practice, and he stated that he mixed a 4-6% solution in tap water at home, to be administered during root canal work. He also stated that he mixed the solution at home for fear that someone would break into his office and take the cocaine. When asked if he would surrender the cocaine, he assented and allowed an agent to accompany him to his bedroom, where he opened a dresser drawer and removed two bottles of cocaine. One of these bottles had been opened, and about one-quarter of the contents of that bottle was missing.

Appellant was subsequently placed under arrest and advised that the officers had a search warrant. A search of the house was made, and other evidence was seized. The officers also seized appellant's automobile, which was parked outside his house. After seizure, but before impoundment, the vehicle was searched and a scale and a bottle labeled "cocaine hydrochloride" were taken from the trunk of the car.

Evidence was also obtained from appellant's office on the same day. The DEA agents who went to that office had in their possession an administrative search warrant for the doctor's

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[3] The evidence fairly indicates that five law enforcement officers were present at this time.

records. However, they also requested samples of his mouthwash solutions, and these samples were given to them by appellant's dental assistant.[4]

Leichtling's primary contention on appeal is that the warrant for the search of his residence was defective and that all fruits of that search should therefore have been suppressed. He bases this contention on the fact that the affidavit fails to establish that the DEA agents saw him enter his house.

The district court found that at the time the warrant was applied for, the issuing magistrate relied solely on the affidavit which was presented to him, and that no evidence was adduced before the magistrate. In these circumstances, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause. *See United States* v. *Anderson,* 453 F.2d 174, 175 (9th Cir. 1971); *United States* v. *Pinkerman,* 374 F.2d 988, 989 (4th Cir. 1967); *Gillespie* v. *United States,* 368 F.2d 1, 3 (8th Cir. 1966).

In reviewing the validity of the warrant, we are guided by certain well established general principles. The search of Leichtling's house was sanctioned by a magistrate's issuance of a search warrant based upon a finding of probable cause. "Courts evince a strong preference for searches made pursuant to warrant, and, in some instances, may sustain them where warrantless searches based on a police officer's evaluation of probable cause might fail." *United States* v. *Brown,* 584 F.2d 252, 256 (8th Cir. 1978), *cert. denied,* 440 U.S. 910 (1979); *United States* v. *Christenson,* 549 F.2d 53, 55 (8th Cir. 1977). *See United States* v. *Ventresca,* 380 U.S. 102, 108 (1965); *United States* v. *McGlynn,* 671 F.2d 1140, 1146 (8th Cir. 1982). Accord-

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[4] The record reflects that the requesting officer probably had been in telephone contact with the DEA agents at appellant's residence prior to the time this request was made.

ingly, reviewing courts should interpret affidavits for search warrants in a commonsense and realistic fashion, and deference is to be accorded an issuing magistrate's determination of probable cause. *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *United States* v. *Brown*, 584 F.2d at 256. "[I]n doubtful or marginal cases, the resolution of the Fourth Amendment question should be determined to a large extent by the preference accorded to searches based upon warrants." *United States* v. *Christenson*, 549 F.2d at 55. *See United States* v. *Ventresca*, 380 U.S. at 109; *United States* v. *Brown*, 584 F.2d at 256, *and cases cited therein.*

Appellant relies primarily on *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), in support of his contention that the affidavit in the case at bar was inadequate. In *Taylor*, the affidavit recited that one Worley was observed exiting a vehicle and walking toward a residence which was assumedly used to store illegally obtained firearms. Because Worley, who was an alleged coconspirator, had not been observed entering or exiting that residence, this court held that there was only a suspicion that Worley had actually done so. *Id.* at 836. In *Taylor*, however, the affidavit did not recite that the residence was occupied by either Taylor or Worley, while in the instant case it is not disputed that the application for the warrant and the supporting affidavit described the residence to be searched as appellant's residence, as it in fact was.

It is settled in this circuit that when an application for a warrant is being considered, the issuing magistrate may properly rely on normal inferences drawn by the surrounding circumstances and the allegations of fact contained in the affidavit. *United States* v. *McGlynn*, 671 F.2d at 1146; *United States* v. *Brown*, 584 F.2d at 256, *and cases cited therein.* As this rule is applied to the instant case, we think the recitation in the affidavit that Dr. Leichtling was observed to drive "to" his residence raises a reasonable inference that he actually entered his residence, because we can think of few situations where a person would

drive to his residence without entering it. Further, this court has held that " '[t]he affidavit need only establish the *probability* of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt.' " *United States* v. *Brown*, 584 F.2d at 257, *quoting United States* v. *Smith*, 462 F.2d 456, 460 (8th Cir. 1972) (emphasis original). We think the affidavit in this case establishes the requisite probability, and therefore, hold that the search warrant was validly issued. *But see United States* v. *Schmidt*, 662 F.2d 498, 505 n.9 (8th Cir 1981) (dictum).

Appellant next argues that the seizure of the two bottles labeled "cocaine hydrochloride" taken from his dresser was invalid because the seizure was not made pursuant to a valid consent. We disagree.

In *United States* v. *Allison*, 619 F.2d 1254 (8th Cir. 1980), this court stated:

> [I]n normal consent search situations, "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth* v. *Bustamonte*, [412 U.S. 218, 227 (1973)].
>
> Since the issue of consent is usually a factual one, a district court's finding of involuntariness must be accepted on appeal unless the finding is clearly erroneous. *Martin* v. *United States*, 586 F.2d 1206, 1211 (8th Cir. 1978); *United States* v. *Hearn*, 496 F.2d 236, 242 (6th Cir.), *cert. denied*, 419 U.S. 1048, 95 S. Ct. 622, 42 L.Ed.2d 642 (1974).

Id. at 1262. This standard, moreover, has not been affected by recent Supreme Court decisions such as *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

The evidence shows that appellant was approximately thirty-seven years old at the time of the consent, and that he is an

educated man. In addition, there is no dispute that appellant was read his *Miranda* warnings, and stated that he understood them, no more than ten minutes prior to the time of consent. These are all factors which may be considered by the district court in determining whether there was a voluntary consent. *See Schneckloth* v. *Bustamonte,* 412 U.S. at 226; *United States* v. *Matthews,* 603 F.2d 48, 52 (8th Cir. 1979).

Appellant nevertheless contends that the presence of police officers' and the failure of the law enforcement officers to inform him that he could withhold consent indicate that there was no voluntary consent on his part. We observe, however, that even where the presence of officers could be construed as constituting "custody," custody alone has never been sufficient to show that consent to a search was the result of coercion. *United States* v. *Matthews,* 603 F.2d at 52. Further, while failure to inform a person of his right to withhold consent is a factor that may be taken into account in determining whether there has been a voluntary consent, *United States* v. *Mendenhall,* 446 U.S. at 558-59, law enforcement officers are nevertheless not required to inform a person of his or her right to withhold consent as a prerequisite to the validity of such consent. *Schneckloth* v. *Bustamonte,* 412 U.S. at 231-33.

We conclude that the district court could properly find, in the totality of the circumstances, that Leichtling's actions in removing the bottles from his dresser drawer and surrendering them to the DEA agents constituted a voluntary consent on his part. The district court's findings in this regard are not clearly erroneous and will therefore be upheld.

---

[1] In this context, appellant also claims that the officers were already searching the living room at the time of the consent. However, our review of the transcript reveals that there was credible testimony that no such search was being conducted at that time.

Appellant's remaining contentions concern the admissibility of evidence obtained from the trunk of his automobile and from his dental office. However, as the Appendix shows, the nature of this evidence is such that it is cumulative at best. Thus, even if we assume for the purposes of this discussion that this evidence was improperly seized, any error in its admission was harmless beyond a reasonable doubt. *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX

DESCRIPTION OF APPELLEE'S EXHIBITS, LOCATION WHERE FOUND, AND SOURCE FROM WHICH OR MEANS BY WHICH EXHIBITS ARE OBTAINED

Exhibit No.	Description	Location	Means
1	Mouth wash sample	Dentist's office	Receptionist
2	"	"	"
3	"	"	"
4	Bottle containing Mannitol	Leather case in hall closet	House search
5	7 Bottles containing various noncontrolled substances	Hall closet	"
6	Bottle containing traces of cocaine	"	"
7	DeSoto Pharmacy prescription bottles bearing witness Harris' name and containing traces of Methaqualone	Back hall closet	"

Exhibit No.	Description	Location	Means
8	3 Bottles containing Mannitol	Leather case in hall closet	"
9	2 Green Bottles containing Methaqualone tablets	Back hall closet	"
10	Bottle containing traces of cocaine	Hall closet	"
11	2 Bottles containing approx. 47 g. cocaine	Dresser in bedroom	Consent of Leichtling
12	Small balance with traces of cocaine	Hall closet	House search
13	Bottle with traces of cocaine	Closet	"
14	2 Brown bottles labeled "cocaine hydrochloride"	Hall closet	"
15	"	"	"
16	Brown scale	"	"
17	Triple beam scale	"	"
18	Screen separator and sifter	Box on fireplace mantel	"
19	210 clear plastic bags	"	"
20	Funnel and separator system	Hall closet	House search
21	Sifter and funnel	Kitchen closet	"
22	Ohaus scale	Auto trunk	Auto search
23	3 Bottles labeled "cocaine hydrochloride"	"	"
24	Envelope bearing financial notations	Top of desk in residence	House search
25	2 Pieces of paper bearing financial notations	"	"
26	Personal checkbook	Case on living room couch	"
27	Patient profile on Leichtling	Rock Road Pharmacy	Rock Road Pharmacy
30	Prescriptions for cocaine hydrochloride	"	"
32	Prescriptions for Methaqualone	DeSoto Pharmacy	DeSoto Pharmacy

APPENDIX 2

§ 843. Prohibited acts C

Unlawful acts

(a) It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter, or (B) to present false or fraudulent identification where the person is receiving or purchasing piperidine and the person is required to present identification under section 830(a) of this title; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Penalties

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

Pub.L. 91-513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95-633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776.

APPENDIX 3

§ 841. Prohibitied acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of the controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter of other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant subsatnces, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194.

APPENDIX 4

AFFIDAVIT

Affiant Steven Stoddard, being duly sworn, states that he is a Special Agent for the Drug Enforcement Administration of the Department of Justice, currently assigned to the St. Louis District Office. Affiant has been a Special Agent with the Drug Enforcement Administration for approximately 12 years, and during that time has received training in the area of the investigation of violations of Federal narcotics controlled substance laws.

In March 1981, the St. Louis District Office of the Drug Enforcement Administration received information regarding a series of purchases of pharmaceutical cocaine by Rock Road Pharmacy of DeSoto, Missouri. A subsequent investigation by the affiant and other agents of the Drug Enforcement Administration revealed a shipment of pharmaceutical cocaine was to be delivered to Rock Road Pharmacy on or about May 22, 1981, to consist of two one-ounce bottles of pharmaceutical cocaine. Surveillance initiated by the affiant and other agents revealed an individual, subsequently identified as Lee Leichtling, to enter the Rock Road Pharmacy and, upon Leichtling's exiting the pharmacy, the agents observed the outline of what appeared to be two similar bottles in a plastic case in his possession. Affiant and other agents then continued their surveillance and observed the subject Lee Leichtling to enter a blue Mercedes automobile and drive in the direction of the residence which is the subject of this search warrant. Affiant and other agents continued their investigation and determined the above residence to be that of Lee Leichtling, whose occupation is that of a dentist engaged in the general practice of dentistry from his office located at 116 North Main Street in downtown DeSoto, Missouri.

Subsequent investigation by the affiant and other DEA Agents revealed that from December 1979 through May 22, 1981, approximately twelve shipments of a total of approximately 23 ounces of pharmaceutical cocaine were sent to Rock Road Pharmacy.

A subsequent surveillance established by the affiant and other DEA Agents revealed that on July 10, 1981, an additional shipment consisting of two one-ounce bottles of pharmaceutical cocaine to be delivered to the Rock Road Pharmacy at DeSoto, Missouri. On the same date, a surveillance of Rock Road Pharmacy revealed the subject Lee Leichtling to enter the pharmacy and receive two one-ounce bottles from the pharmacist and depart the store. At this time, surveilling agents observed the subject Lee Leichtling to place a pharmacy bag inside a brown vinyl case which appeared to be identical to the case he used on May 22, 1981; thereafter, the subject Lee Leichtling entered a blue Mercedes automobile which is registered to him, and proceeded to drive to the above-described residence.

DEA Agents continued their investigation and contacted the Chief of the Registration Section of the Drug Enforcement Administration in Washington, D.C., and ascertained that the subject Lee Leichtling is not authorized or registered to possess, distribute, or dispense Schedule II narcotic controlled substance drugs.

Based on this affiant's prior training and experience, he is aware that cocaine is in fact classified under the narcotics laws as a Schedule II narcotic controlled substance drug.

Additional investigation has revealed that subject Lee Leichtling is not registered with state authorities at the Missouri Bureau of Narcotics to possess, distribute, or dispense controlled substance drugs. Affiant states that under State law cocaine is classified as a Schedule II narcotic controlled substance drug.

Additional investigation by affiant and other DEA Agents has revealed that cocaine is not generally utilized in the general practice of dentistry.

STEVEN STODDARD, Special Agent
Drug Enforcement Administration

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

Docket No._____

Case No._____

United States of America,

vs.

Single-Family White Frame Residence, immediately northeast of the intersection of Highway 21 and Boyd Street, DeSoto, Jefferson County, Missouri.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE David D. Noce
Name of Judge[1] or Federal Magistrate

Address of Judge[1] or Federal Magistrate

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) residence, post office address R.F.D. 6, Box 42A, DeSoto, Missouri, being more particularly described as a single-family white frame residence with black asphalt shingle roof, having a single-car garage attached on the south side of the house, located immediately northeast of the intersection of Highway 21 and Boyd Street, DeSoto, Jefferson County, in the Eastern District of Missouri there is now being concealed certain property, namely a quantity of cocaine, a Schedule II narcotic controlled substance drug; together with weighing and packaging material adulterants and dilutants; and items of personal iden-

tification, including rent and utility receipts and telephone tolls tending to establish constructive possession of such contraband, drugs, telephone tolls and bills, hotel bills, records of banking, personal address books, records and notations of narcotic purchases and sales, records of drug customers and sources and of indebtedness for narcotics which are contraband and evidence of the unlawful possession and distribution of the same and of conspiracy to do so and possess and distribute, in violation of Federal law, i.e., Title 21, United States Code, § 841(a)(1), etc.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows.[3]

SEE ATTACHED AFFIDAVIT

/s/ STEVEN STODDARD, Special Agent
Signature of Affiant.
Drug Enforcement Administration
Official Title, if any.

Sworn to before me, and subscribed in my presence, July 16, 1981

/s/ DAVID D. NOCE
Judge[1] or Federal Magistrate.

---

[1] United States Judge or Judge of a State Court of Record.

[2] If a search is to be authorized "at any time in the day or night" pursuant to Rule 41(c), show reasonable cause therefor.

[3] If the warrant is to authorize execution pursuant to 21 U.S.C. § 879 without prior notice of authority or purpose, indicate the circumstances creating the need for such a warrant.

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI

Docket No. 81-1176M-2

United States of America,

v.

Single-Family White Frame Residence, immediately northeast of the intersection of Highway 21 and Boyd Street, DeSoto, Missouri.

SEARCH WARRANT

TO: Steven Stoddard, Special Agent, Drug Enforcement Administration, or to any duly authorized Agent of the Drug Enforcement Administration, or to any Civil Officer of the United States authorized to enforce any law thereof.

Affidavit(s) having been made before me by Steven Stoddard, Special Agent, Drug Enforcement Administration.

that he has reason to believe that (on the premises known as) residence, post office address R.F.D. 6, Box 428, DeSoto, Missouri, being more particularly described as a single-family white frame residence with black asphalt shingle roof, having a single-car garage attached on the south side of the house, located immediately northeast of the intersection of Highway 21 and Boyd Street, DeSoto, Jefferson County. A photograph of this residence is attached. S.D.S.

In the Eastern District of Missouri there is now being concealed certain property, namely a quantity of cocaine, a Schedule II narcotic controlled substance drug; together with weighing and packaging materials, adulterants and dilutants; and items of

personal identification, including rent and utility receipts and telephone tolls tending to establish constructive possession of such contraband, drugs, telephone tolls and bills, hotel bills, records of banking, personal address books, records and notations of narcotic purchases and sales, records of drug customers and sources and of indebtedness for narcotics which are contraband and evidence of the unlawful possession and distribution of the same and of conspiracy to do so and possess and distribute, in violation of Federal law, i.e., title 21, United States Code, § 841(a)(1), etc.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before David D. Noce, Federal judge or magistrate, as required by law.

Dated this 16th day of July, 1981.

David D. Noce
Judge (Federal or State Court of Records) or Federal Magistrate.

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* The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

Return

I received the attached search warrant , 19 , and have executed it as follows:

On , 19 at o'clock M, I searched the person or premises described in the warrant and

I left a copy of the warrant with (name of person searched or owner or "at the place of search") together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

(See attached list)

This inventory was made in the presence of
and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

_____

Subscribed and sworn to and returned before me this day of , 19 .

_____

Federal Magistrate

Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-633

In the Supreme Court of the United States

OCTOBER TERM, 1982

LEE S. LEICHTLING, D.D.S., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JAMES G. LINDSAY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the affidavit submitted to the magistrate contained sufficient facts to support issuance of a search warrant for petitioner's home.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-633

LEE S. LEICHTLING, D.D.S., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 684 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1982. A petition for rehearing was denied on August 10, 1982, and the petition for a writ of certiorari was filed on October 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on six counts of obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3), and on one count of possession of cocaine with intent to distribute, in

violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to three years' imprisonment on each of the first six counts, the sentences on counts I, II and III to run consecutively to each other but concurrently with the consecutive sentences on counts IV, V, and VI. He was sentenced to a ten year term of imprisonment and three years' special parole on Count VII, to run concurrently with the other sentences. The court of appeals affirmed (Pet. App. A-1 to A-9).

Petitioner was a dentist practicing in Desoto, Missouri. From July 1979 until his arrest on July 17, 1981, petitioner entered the Desoto Pharmacy each month and wrote a prescription for methaqualone in the name of Eleanor Harris (Tr. 63-68). Petitioner took the methaqualone with him and either paid for it at the time of the transaction or charged it to his account (Tr. 71-72). Petitioner told the pharmacist that Mrs. Harris was damaging her dental work by grinding her teeth and that the methaqualone was intended to control the grinding (Tr. 71). In fact, Mrs. Harris had not seen petitioner since 1978, had never had a problem with grinding her teeth, and had never received any methaqualone from petitioner (Tr. 81-82, 83-87).

During the period between May 1978 and July 1981 the pharmacist at the Rock Road Pharmacy in Desoto, Missouri, filled some 18 prescriptions for a total of 28.75 ounces of cocaine hydrochloride written by and for petitioner (Gov't Exh. 30; Tr. 91-99). Petitioner paid for each of these prescriptions with a personal check (Tr. 99-100). He indicated to the pharmacist that the cocaine was used in 5% solution as a mouthwash for root canal patients (Tr. 101).

Petitioner's secretary, his dental assistant, and his dental hygienist were unaware of these purchases or of any professional use of cocaine hydrochloride in petitioner's office (Tr. 113-115, 118-120, 125-126). Samples of mouthwash taken from petitioner's office contained no cocaine (Tr. 136,

143). Petitioner's 1981 renewal Drug Enforcement Administration (DEA) registration indicated that he did not intend to handle Schedule II narcotics, a category that included cocaine (Tr. 162, 165-166).

In May 1981, DEA agents were informed that the Rock Road Pharmacy had ordered two ounces of cocaine to be delivered to the pharmacy on May 22, 1981 (Tr. 6-7). On that date DEA agents observed petitioner enter the pharmacy, remain inside for about ten minutes, then emerge carrying a brown attache case that apparently contained two bottles, and drive toward his house (Tr. 7-8). On July 10, 1981, a DEA agent observed petitioner enter the pharmacy, obtain two bottles of cocaine, place the bottles in his attache case, drive to his house, and take the attache case into the house (Tr. 8-9, 169-172). As a result of the DEA agents' observations, a warrant was obtained for the search of petitioner's home.

Government agents went to petitioner's house on July 17, 1981, and informed him that they wished to discuss his cocaine purchases (Tr. 173). With petitioner's consent, the agents entered the home and then read him his *Miranda* rights (Tr. 173-175). Petitioner agreed to be interviewed and advised the agents that he used the cocaine in a mouth rinse but that none of his office employees was aware of it (Tr. 176-177). When asked about the cocaine he had purchased on July 10, petitioner agreed to turn it over to the agents; he obtained the two bottles, one partially empty, from his bedroom (Tr. 177-178, 180). At that point, petitioner was arrested and the search warrant for his house was executed. The search revealed a number of bottles of mannitol (a common dilutent for illegally-used cocaine), a number of empty bottles containing traces of cocaine, two bottles of methaqualone tablets, three scales (one with traces of cocaine), and various other equipment utilized in preparing

cocaine for illegal distribution (Pet. App. A-8 to A-9). A search of petitioner's car disclosed another scale and three bottles labeled "cocaine hydrochloride" (*id.* at A-9).

ARGUMENT

Petitioner's sole contention is that the affidavit (Pet. App. A-17 to A-19) in support of the search warrant did not establish the requisite probable cause to believe that contraband would be found in his house. The crux of petitioner's argument is that the affidavit — which states that the affiant saw petitioner obtain bottles of what was believed to be cocaine, place them in a brown vinyl case, and then "drive *to* [his] residence" (Pet. App. A-18; emphasis added) — does not specifically state that petitioner, after driving *to* his residence, went *into* his residence with the cocaine. This argument has no merit.[1]

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[1]As noted above, petitioner voluntarily surrendered the two bottles of cocaine that formed the basis of Count VII (possession of cocaine hydrochloride with intent to distribute) prior to the execution of the search warrant. Although various items discovered in the house provided additional evidence indicating intent to distribute (see Pet. App. A-8 to A-9), that intent was inferable from the bottles labeled "cocaine hydrochloride" found in petitioner's car, the scale found in petitioner's car, petitioner's numerous prescriptions for cocaine and methaqualone from the pharmacies, the samples of mouthwash seized from petitioner's dental office, the testimony of petitioner's patient for whom the methaqualone prescriptions had been written but who had never received any methaqualone, and the testimony of petitioner's employees who were unaware of any professional use of cocaine hydrochloride by petitioner or of any purchases of cocaine hydrochloride for professional use by petitioner. Thus, the validity of petitioner's conviction on Count VII does not depend on the adequacy of the affidavit and resulting search warrant. Since the sentence on Count VII was concurrent to and exceeded the sentences on all other counts, this Court may apply its discretionary concurrent-sentence doctrine and decline to review petitioner's case. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

The affidavit states (Pet. App. A-18):

> A subsequent surveillance established by the affiant and other DEA Agents revealed that on July 10, 1981, an additional shipment consisting of two one-ounce bottles of pharmaceutical cocaine to be delivered to the Rock Road Pharmacy at DeSoto, Missouri. On the same date, a surveillance of Rock Road Pharmacy revealed the subject Lee Leichtling to enter the pharmacy and receive two one-ounce bottles from the pharmacist and depart the store. At this time, surveilling agents observed the subject Lee Leichtling to place a pharmacy bag inside a brown vinyl case which appeared to be identical to the case he used on May 22, 1981; thereafter, the subject Lee Leichtling entered a blue Mercedes automobile which is registered to him, and proceeded to drive to the above-described residence.

Based in significant part upon his observation of these activities, the DEA agent averred that he had reason to believe that there was a quantity of cocaine in petitioner's house (Pet. App. A-20 to A-21).

This Court has held that "affidavits for search warrants * * * must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965). Here the DEA agent had personally observed the circumstances that led him to believe there was cocaine in petitioner's house. "[W]here [the underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Id.* at 109. Moreover, the issuing magistrate may properly rely upon normal inferences to be drawn from the

facts presented to him. See, e.g., *United States* v. *McGlynn*, 671 F.2d 1140, 1146 (8th Cir. 1982), *United States* v. *Allen*, 588 F.2d 1100, 1106 (5th Cir.), cert. denied, 441 U.S. 965 (1979); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). And, as this Court consistently has recognized, "determination of probable cause [by a magistrate issuing a warrant] should be paid great deference by reviewing courts," *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); see also *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964); *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960).

Here, petitioner was seen driving to his house with a large amount of pharmaceutical quality cocaine hydrochloride; he was not authorized to possess cocaine, which is not generally used in dental practice (Pet. App. A-18 to A-19). The affidavit's statement that petitioner drove "to" his home with an illegal substance clearly raises the reasonable inference that he took it *into* his home. Thus, this case differs from those upon which petitioner relies (Pet. 6-10). Unlike *United States* v. *Flanagan*, 423 F.2d 745 (5th Cir. 1970), and *United States* v. *Lockett*, 674 F.2d 843, 846 (11th Cir. 1982), where the courts noted that the contraband had not been observed in or near the premises to be searched, here the DEA agent saw petitioner drive to his home with cocaine.[2] Accordingly, the affidavit in this case would pass muster in all courts of appeals.

In any event, it is undisputed that the affiant actually observed petitioner take the cocaine into his house (Tr. 9). In these circumstances, it would have been unreasonable for the magistrate to conclude, as petitioner suggests (Pet. 8),

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[2]This case also differs from *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), for the reasons noted by the court of appeals (Pet. App. A-5).

that the cocaine was more likely to be located at the dentist's office. Both the trial court (Tr. 33) and the court of appeals (Pet. App. A-6) found that the affidavit stated facts sufficient to show probable cause. Further review by this Court of that purely factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-633

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OCTOBER TERM, 1982

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

Petitioner contends that the affidavit (Pet. App. A-17 to A-19) in support of the search warrant did not establish the requisite probable cause to sustain a magistrate's finding that contraband would be found in his residence. The affidavit states that on one occasion, the affiant observed appellant to be in possession of contraband and "drive in the direction of the residence" (Pet. App. A-17), and on another occasion "drive to the above-described residence." (Pet. App. A-18). The affidavit is void of any allegation by the affiant that the appellant transported contraband into his residence, or even that appellant exited his vehicle.

Respondent suggests that this defect is cured by the affiant's testimony (Tr. 9) that he observed petitioner take the contraband into his house (Resp. 6). The obvious flaw in respondent's argument is that this testimony was adduced at petitioner's motion to suppress evidence, approximately three months *after* the presentation of the affidavit to the magistrate. In the same motion, the affiant conceded that the affidavit lacked any information concerning the petitioner exiting his vehicle, entering his house, or carrying contraband therein (Tr. 13).

The finding of probable cause to support the issuance of a search warrant must be based upon information contained solely in the sworn affidavit and/or sworn recorded testimony presented to the magistrate. *Zurcher* v. *Stanford Daily News*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1963). Respondent mistakenly argues that it would be "unreasonable" for the magistrate to conclude that the contraband was anywhere else but inside petitioner's residence (Resp. 6-7). Petitioner submits, and the record and affidavit clearly reveal, that the magistrate had no evidence before him that the petitioner carried contraband into his house, nor even that petitioner exited his vehicle (Tr. 13, Pet. App. A-17 to 19).

Respondent's brief requests the Court to invoke the concurrent-sentence doctrine and decline to review petitioner's case (Resp. 4, n.1). Of course, this option lies purely in the discretion of the Court, as there is no jurisdictional bar to consideration of multiple convictions, even though concurrent sentences were imposed. *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969). Although the *Benton* Court had difficulty finding any satisfactory explanation for the concurrent sentence doctrine, *Id.*, at 789, petitioner submits that the doctrine is inapplicable here as the evidence obtained in the illegal search of petitioner's residence tainted petitioner's entire case so as to deprive him of a fair trial.

Petitioner was charged with six counts of obtaining a controlled substance by fraud and one count of possession of a controlled substance with the intent to distribute. A total of thirty-three government exhibits (Tr. V-VI) were admitted into evidence over counsel's objection (Tr. 44, 249). Petitioner argues that due to the sheer number and nature of the government exhibits, e.g., scales, bottles labeled cocaine, cocaine and quaalude prescriptions, the trial error in admitting same affected all seven counts of petitioner's convictions. Thus, all of the evidence was indelibly tainted by the admission of the above exhibits, precluding application of the concurrent-sentence doctrine. *Benton*, at 789, n.2.

Additionally, the adverse collateral effects of petitioner's seven count conviction, recognized in *Sibron* v. *New York*, 392 U.S. 40 (1968), makes petitioner's case justiciable. Examples of collateral consequences of a multiple count conviction cited in the *Benton* opinion included impeachment at a later trial and enhanced sentencing statutes utilized in many states. *Benton*, at 790, 791. The *Benton* examples, though significant in themselves, are purely theoretical and pale in comparison to the direct collateral effects facing this petitioner. Lee S. Leichtling, D.D.S., is a professional man, currently fighting to retain his license in state administrative courts. The effect of a multiple count conviction in these proceedings cannot be overstated.

CONCLUSION

For the above-stated reasons and because of the important and far reaching constitutional question involved the petition for a writ of certiorari should be granted.

Respectfully submitted,

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